

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

DATE: July 31, 2000

CASE NO.: 1999-LHC-1546

OWCP NO.: 5-103759

In the matter of

NORA KOVACIC
Claimant

v.

NAVY EXCHANGE SERVICE COMMAND
Employer

and

CRAWFORD AND COMPANY
Carrier

APPEARANCES:

Edgar R. Jones, Esquire
For the Claimant

R. John Barrett, Esquire
For the Employer

BEFORE: GERALD M. TIERNEY
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et. seq., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in

disability or death.

PROCEDURAL HISTORY

The Claimant seeks permanent and total disability benefits from an injury sustained on May 5, 1996. A formal hearing was held before the undersigned on November 9, 1999. Claimant's Exhibits (CX) 1-121 and Employer's Exhibits (EX) 1-32 were admitted to the record without objection.

I. STIPULATIONS

The parties stipulate and I find:

- A. The Claimant was injured on May 5, 1996 while in the course and scope of her employment with Nexcom.
- B. The Claimant has been temporarily and totally disabled from July 3, 1996 to the present.
- C. That jurisdiction exists under the Longshore and Harbor Workers' Compensation Act and its extension, the Non-Appropriated Funds Instrumentalities Act.
- D. That Claimant's average weekly wage is \$150.20.
- E. That Employer had notice of the injury and that a timely claim for benefits was filed.
- F. That Claimant is entitled to and has received medical services as required by §7 of the Act.
- G. That Special Fund entitlement issue will not be briefed by Employer and Solicitor unless a finding of permanent total disability is made.

II. ISSUES

- A. Whether the Claimant has reached maximum medical improvement from the disability.
- B. Whether the interest due to Claimant has been properly calculated.
- C. Whether the Claimant is entitled to a penalty for the late payment of compensation.
- D. Whether the employer is entitled to relief under Section 8(f) of the Act.

III. FINDINGS OF FACT

A. BACKGROUND

The Claimant, Nora Kovacic, was first injured in July of 1995 working as a housekeeper, when she pulled on a bed, the box spring bent and the edge of the bed struck her left knee. She was able to return to light duty but sustained a second injury in May of 1996. The Claimant fell

on a wet laundry room floor and struck her left knee directly upon the ground.

CLAIMANT'S MEDICAL EVIDENCE

Claimant's Testimony

The Claimant currently resides in Erie, Pennsylvania and is married. (TR 74). She came to the United States in 1986 from Britain. (TR 80-81). The Claimant has dual citizenship and was 42 years of age at the time of hearing. Id. The Claimant testified that she has no education and has essentially performed jobs which consisted of physical labor all of her life. These positions have included working at a day care center looking after children and working as a housekeeper at a Navy Lodge. (TR 86-87). The Claimant has never driven an automobile and has never been trained to type or work on a computer. Id.

The Claimant testified that she has seen sixteen doctors and has had seven different nurses working on her case since the date of her second accident on May 5, 1996 when she slipped on a wet laundry floor at work. (TR 87-88). The Claimant attested that none of the nurses have been able to help her and that it is very hard for her to bathe herself and that her husband must be close in case of an accident. Id.

The Claimant testified that since the accident she has developed further medical problems including problems with her right wrist, right knee and her hip that were not present pre-accident. She wears a brace on her wrist which she says is due to carpal tunnel syndrome caused by using a cane. She also wears a brace on her right knee to help with the pain. Dr. Schaffer prescribed the cane the Claimant uses. Dr. Thomas prescribed the walker she sometimes uses at home. Dr. Thomas, Dr. DeMarco and Dr. Bergfeld have prescribed a wheelchair. (TR 92).

The Claimant testified that she has ulcers from stress and worry about her physical condition. (TR 93). She takes Zantac and Zoloft as well as other medications to help with her depression, anxiety, headaches and pain. Id.

The Claimant attested that her condition has worsened since the injury. (TR 93-94). Her left leg is numb, there is a big hole in her left knee where they removed tissue and she is in constant pain. (TR 94).

The Claimant had her first operation on October 16, 1996. (TR 95). It was performed by Dr. Schaffer. Id. She was on crutches for 14 weeks at which time it just continued to get worse. (TR 96). Dr. Schaffer did not choose to do any follow-up surgery but instead the Claimant went through therapy from November of 1996 to March of 1997. (TR 97). The Claimant testified that the therapy was not beneficial at all. Id.

The Claimant then saw Dr. Bergfeld at which time the Claimant testified that he told her she would have to start wearing a knee brace and place insoles into her shoes. He prescribed some

medication for her pain and told her that she needed pain management and psychological help. (TR 97-98). Dr. Thomas, the pain management doctor, and Dr. DeMarco, the psychologist, were then consulted. Id.

The Claimant attested that Dr. Bergfeld recommended a knee replacement initially but did not perform it at this time because the Claimant was too young. (TR 99). The only other suggestion Dr. Bergfeld had at this time was water therapy which the Claimant performed previously for 10 months, but discontinued at this time as it was only causing more pain. Id.

The Claimant again saw Dr. Bergfeld in October of 1999. At this time another X-ray was taken and doctor noted that two bones in the Claimant's knee were rubbing together. (TR 99-100). The Claimant testified that Dr. Bergfeld told her to go back to Erie to be with her two pain doctors and that the major operation, the knee replacement, was still not appropriate. Id. Dr. Bergfeld had no other recommended treatments at that time. (TR 100).

The Claimant testified that she sleeps with 10 pillows at night and takes medication three to four times throughout the night. (TR 102). Ms. Kovacic further testified that her hair is falling out and she remarked that she has ugly marks on her face. Id.

The Claimant has no strength in her left knee and her right knee is giving her a lot of trouble and she is unable to balance herself on her legs. (TR 104).

On cross-examination, the Claimant testified that she initially hurt her knee in July of 1995 and eventually went back to work and then hurt it again in May of 1996. (TR 108). The Claimant believes that both Dr. DeMarco and Dr. Thomas have been helping her and that she feels better after seeing them and talking with them. Id.

The Claimant admitted that she trusts Dr. Bergfeld. (TR 109). When asked if she would believe Dr. Bergfeld if he told her that an operation would reduce her pain, Ms. Kovacic claims that initially Dr. Bergfeld told her that surgery was not appropriate at this time and that he wanted her to continue to wear the knee brace and keep seeing Dr. DeMarco and Dr. Thomas. (TR 109).

Robert Kovacic's (Claimant's Husband) Testimony

Robert Kovacic, the Claimant's husband testified at the hearing. He has been married to the Claimant for over 13 years. (TR 74). Mr. Kovacic testified that his wife has been unable to take long walks and dance, which were hobbies that she enjoyed greatly before her injury. (TR 75). He further testified that the Claimant is unable to help with any housework and very seldom goes shopping. (TR 6)

When asked on direct examination about his observations as to his wife's future, Mr. Kovacic responded that he does not see much of a future, everything seems to be deteriorating and there is no improvement even after seeing 16 doctors. (TR 78)

THE MEDICAL EVIDENCE

Dr. Anthony D. DeMarco's Testimony

Dr. DeMarco is a licensed psychologist and testified as an expert witness. (TR 25, 28). He has worked in the mental health field since the early 1970's and was licensed in 1987. *Id.* He has two Masters' Degrees in Clinical Psychology and is currently working on his doctorate. (TR 26). The Claimant was referred to Dr. DeMarco by a physician names Joseph Thomas, M.D., who is a pain management specialist. (TR 27).

Dr. DeMarco's treatment of the Claimant has sometimes required him to speak to her on the phone between scheduled visits due to extra difficulties or problems. (TR 29).

Dr. DeMarco first saw the Claimant in January of 1998. (Tr 29). He testified that his diagnosis was a severe adjustment mental depression, a reactive depression that appeared to relate to her occupational injury as well as some type of pain disorder. *Id.*

When questioned about the severity of the Claimant's condition, Dr. DeMarco described her depression as severe. (TR 32). There have been occasions where it seemed to improve to moderate, however, it continues to fluctuate. *Id.* Dr. DeMarco testified that he cannot say that the Claimant has significantly improved, and that at times it appears that she is losing ground emotionally. (TR 33).

Dr. DeMarco described the Claimant as typically depressed and very anxious. (TR 34). She has panic attacks often, and has been very angry over the stresses and problems in her life. *Id.* Dr. DeMarco characterized the Claimant as a truthful person who has not seemed to distort or misrepresent any of her symptoms. *Id.*

Dr. DeMarco and Dr. Thomas have recommended anti-depressants and anti-anxiety medications to the Claimant. (TR 35). When questioned about the severity of the Claimant's condition, Dr. DeMarco rated the Claimant's depression as an eight on a scale from one to ten. (TR 38). He rated the pain disorder at an eight. *Id.*

In his testimony Dr. DeMarco identified Claimant's Exhibit 39 as a letter he had written after approximately 9 months treating the Claimant, indicating that he felt she was permanently disabled by her condition. (TR 39-40). This opinion was based on consideration of the Claimant's physical as well as mental conditions. *Id.*

Dr. DeMarco testified through session notes that are admitted into evidence (Claimant's Exhibit 71), that the Claimant complains of pain in the knee, swelling and pus drainage from the left knee. (TR 41-42). The Doctor further testified that when the Claimant would come for a session he would allow her to enter through the back entrance because there were no steps to contend with. *Id.*

Dr. DeMarco testified about a follow-up letter (C-70) he had sent Dr. Bergfeld, the Claimant's orthopedic surgeon, who asked for psychological assistance through Dr. Thomas who then in turn referred Ms. Kovacic to Dr. DeMarco. (TR 43-44). In the letter, Dr. DeMarco noted that the Claimant's physical problems with ambulating seemed to be preventing any opportunity for improvement in her emotional state and that if there were any options that he knew of that may help her at this time some of her stress might be relieved. *Id.* Dr. DeMarco further explained that the Claimant was having further problems with her other knee, hip and wrist and that he hoped a wheelchair might be an option for the Claimant as it would significantly improve her quality of life. (TR 45)

On cross-examination, Dr. DeMarco was asked whether the Claimant's mental condition would improve if her orthopedic problems were lessened. (TR 46-47). He answered that it is possible that she would improve emotionally, but given the length of her symptoms, he suspects that the odds are likely that she will continue to have some problems emotionally. *Id.*

Dr. DeMarco admitted that the initial goals were to try and provide pain management education and teach relaxation techniques so that the Claimant could lessen her distress. (TR 48). However, the goals were modified to simply work on preventing the condition from getting any worse because over time, her emotional state got continually worse. *Id.* The Doctor testified to the fact that three months from the date of the hearing was the last time the Claimant's depression could be characterized as moderate. *Id.*

On September 17, 1998 during a session Dr. DeMarco did relay to the Claimant that she is not totally without hope and there are some opportunities for improvement. (TR 50). Then a year later on September 23, 1999 the Doctor's reports noted that the mental status of the patient was a bit better. *Id.*

On re-direct examination Dr. DeMarco reiterated that he believes the Claimant is permanently disabled and that all that can be done for her is to help her adjust to her condition and try to provide her with the highest quality of life possible. (TR 51).

John A. Bergfeld, M.D.

Dr. Bergfeld, an orthopedic surgeon, was deposed by the parties on November 5, 1999. At the time of the deposition he held the current position of Director of the Cleveland Clinic Sports Health. (DP 5). Dr. Bergfeld serves as the team physician to two local professional sports teams as well as treats people who have been injured at work. *Id.*

Dr. Bergfeld's first examination of the Claimant was on June 4, 1997. (DP 6). At this time the doctor was able to deduce by examining the Claimant and the treatment notes of Dr. John Schaffer, the Claimant's previous doctor, that the Claimant had undergone two surgeries, an arthroscopy and an articular cartilage transplantation. (DP 7)

Dr. Bergfeld was asked on direct examination whether he formed a working diagnosis of what was going on with Ms. Kovacic's knee. He responded by stating that his impression was that she has post-traumatic arthritis and probable early degenerative osteoarthritis of the left knee. (DP 10). He further explained that on his first visit he came to the opinion that he did not feel that the Claimant was disabled as far as her working ability was concerned. Id. The doctor recommended that the Claimant follow a work hardening program, to gain further education so that she may perform sedentary work, because he believed that she would never be able to return to doing any heavy physical work. All of these opinions were recorded in a letter that Dr. Bergfeld sent the Claimant post-examination. (DP 11).

The Claimant next visited Dr. Bergfeld on August 27, 1997. (DP 11). The Doctor testified in the deposition that the Claimant complained of persistent pain with which she was having difficulty dealing with. She would lose her breath from the intensity of the pain and walked with a significant limp. Id. Again, the Doctor testified that he believed that she was suffering from mild arthritis and prescribed consultation with a pain therapist as well as injected her with 30 milligrams of Aristospan, a cortisone preparation. Id.

On January 2, 1998, Dr. Bergfeld wrote the Claimant a letter (CE 33) confirming that his recommendation was that she seek counseling as far as depression and chronic pain management. (DP 13). Dr. Bergfeld testified about a memo he wrote to Dr. Hoffman, of rheumatology, around this same time. (DP 14). This memo contained Dr. Bergfeld's opinion that the Claimant might need a surgical procedure, but her present condition would prevent that from taking place right now. Id.

Dr. Bergfeld testified that his records showed the next meeting with the Claimant took place in June of 1998. (DP 12-13). At this time, the Doctor found no improvements in the physical condition of the knee, continued pain felt by the Claimant and she was limping. (DP 13).

Dr. Bergfeld further testified that on September 8, 1999, he wrote Deborah Hoffman, one of the Claimant's case managers, a letter expressing his opinion that Ms. Kovacic could still do sedentary work. (DP 14-15).

Dr. Bergfeld next saw Ms. Kovacic on October 27, 1999 and her mood appeared improved. He testified that he saw no swelling of the knee or drainage on this visit but was able to detect from the new X-rays a worsening of the arthritis. (DP 15). Dr. Bergfeld went on to testify that the Claimant's range of motion of her knee was from zero to 90 degrees. Normal range of motion is zero to 140 degrees.

Dr. Bergfeld testified that after the October 27, 1999 appointment with the Claimant he came to the opinion that she will eventually need a total knee replacement. (DP 17). Dr. Bergfeld explained that if the operation were performed the patient would be on crutches for three to four weeks and ambulating by six to eight weeks. By 12 weeks after the surgery, the patient is generally doing fairly well. Id. However, Dr. Bergfeld explained that these numbers were for an

average patient, which Ms. Kovacic is not. Id.

Dr. Bergfeld testified that he believed the Claimant would have great difficulty with the postoperative period. He based this on his evaluation of the Claimant's lack of success with current treatments. (DP 17). The Doctor classified this operation as being non routine based on her psychological status. Id.

Dr. Bergfeld was asked what type of work the Claimant would be able to perform if a knee replacement surgery was performed and was deemed successful. He responded that he believed Ms. Kovacic could perform light work. (DP 18). He continued by explaining that after a knee replacement, patients are not to be carrying heavy objects or squatting. Id. Dr. Bergfeld continued his testimony by stating that in his opinion Ms. Kovacic can still benefit from both his treatment and psychiatric and pain management treatment. Id.

Dr. Bergfeld responded "yes" when asked if he believes the Claimant can improve. (DP 18). He then answered "no" when asked if in his opinion she has reached maximum medical improvement. Id.

Dr. Bergfeld was asked about the differences in the two different MRI's that were taken. The first MRI was after the initial injury. The Doctor testified that one of the impressions on this MRI was "extensive abnormalities throughout the medial meniscus extending very close to, but probably not resulting in a frank tear." (DP 19). However, after the second injury, the doctor said that he saw a frank tear. Id.

Dr. Bergfeld testified that it is hard to tell if the condition worsened after the second injury but another injury could aggravate a situation like Ms. Kovacic's after the initial fall. (DP 20).

On cross-examination Dr. Bergfeld testified that he recalled that Ms. Kovacic came to her last appointment in a wheelchair that had been prescribed to her by Dr. Thomas. (DP 22)

When asked on cross-examination to characterize the Claimant's condition, Dr. Bergfeld said that her knee joint has deteriorated as shown on the X-rays. However, subjectively he thinks that her demeanor and depressive state have actually improved. (DP 24).

Dr. Bergfeld admitted that he was surprised and disconcerted when he saw the pictures the Claimant brought to him showing the drainage from her knee. He testified that he thought it could have been a low grade infection although at the time of the visit the knee did not appear infected. (DP 25).

When asked on cross-examination if it was his opinion that the cartilage transplantation that Ms. Kovacic received was a failure, the Doctor answered "yes". (DP 27). He further testified that it is a combination of the failed operation and the fall at work that have caused the present pain that the Claimant is experiencing. Id.

On cross-examination the Doctor was asked about his opinion on Ms. Kovacic having knee replacement surgery. (DP 28). He relayed that he has informed the Claimant that she is fairly young for a knee replacement and by being so young she should try to go without the surgery as long as possible because the knee replacements can wear out. Id. He went on to state that the average age of a knee replacement patient is between 60 and 70. Id. The Doctor further explained that the reason that usual knee replacements are done on older patients is that the average prostheses lasts between 15 to 20 years. (DP 29). The Doctor agreed that as the Claimant is only 41 years old, she would most likely require additional knee replacements. Id. Dr. Bergfeld's testimony continued by explaining that the first replacement performed on a knee is the most successful in that 90-95 percent of the patients do well after the operation. After the second operation, the percentage drops to 75. Id.

On cross-examination Dr. Bergfeld was asked if he had exhausted all treatment possibilities with the Claimant leaving the only option a knee replacement. (DP 30). His response was yes after he had ruled out another operation called a tibial osteotomy because the Claimant is not in the psychiatric state to cope with that specific procedure. (DP 31-32).

Dr. Bergfeld was asked if he saw any problems in the Claimant's right knee (non-operative knee) or her hips. (DP 32-33). He testified that he believes that the pain she is experiencing in her hip is due to her limping. (DP 33). He further testified that he believes any problems that she is having with her right knee would be intrinsic to her right knee and would not be a result of the arthritis in her left knee. Id.

Dr. Bergfeld was asked if he was able to determine if the arthritis was post injury or present before the injury. (DP 34). The Doctor answered by explaining that it is very difficult to tell and that it cannot be accurately determined.

On cross-examination the Doctor was asked if he was aware that Ms. Kovacic was complaining about pain in her right wrist. (DP 35). He responded yes and went on to explain that people who use their wrist for heavy activity can develop carpal tunnel syndrome. Id.

Dr. Bergfeld was next asked about a letter he wrote to the Claimant in December of 1997. (DP 35-36). The Doctor agreed that the letter reflected his opinion that at that time he did not feel that any operation on the knee would be wise. Id. The Doctor was then asked if this was still his opinion at the present time. The Doctor's response was not clear as he did not articulate if his opinion has changed, instead he explained why he came to the initial opinion he formed in 1997. (DP-36).

Dr. Bergfeld then testified about the psychiatric care that Ms. Kovacic has been receiving. (DP 37). He agreed that the doctors were doing a "good job with her". Id.

Dr. Bergfeld was asked about a letter written September 8, 1998 where he stated that the Claimant had significant degenerative arthritis in the knee and that she is a relatively young

candidate for a total knee replacement. (DP 37-38). In the last paragraph of this letter, Dr. Bergfeld agreed that he said the Claimant could do sedentary work. However, the letter stated that Ms. Kovacic was “totally disabled”. Dr. Bergfeld testified that what he meant in his diagnosis was that she is disabled from doing a job that requires standing for prolonged period of time like housekeeping. (DP 38).

Dr. Bergfeld was then asked if he recalled the Claimant ever telling him that she could not sit for extended periods of time. (DP 38-39). He said that he thinks that she told him her knee hurts all the time. (DP 39).

Dr. Bergfeld was asked if he would agree that a total knee replacement is the only option left to the Claimant. (DP 41). He agreed by stating “as far as surgery for her knee, yes”. Id. The Claimant’s counsel then followed by asking if Dr. Bergfeld felt that now is the appropriate time for a knee replacement. Id. He answered no. Id. Dr. Bergfeld then explained through testimony that he thought the time would be more appropriate when the psychiatrist and psychologist felt that the Claimant was stable enough to handle the stress of a major operation. (DP 42-45).

The Doctor said that there may be times when the Claimant’s psychological condition makes surgery necessary. Id. Finally, the Doctor testified that he believes that an average knee replacement surgery costs between \$25,000 to \$30,000. (DP 47).

Dr. Bergfeld was asked to clarify some of his earlier testimony on re-direct examination by the Employer’s counsel. (DP 47-48). He restated that he does not believe the pain in the right knee is related to the work injury. He believes that the carpal tunnel could be related to the work injury because she uses a cane in her right hand for her left knee. Id. He further stated that he does not believe that there is any arthritis in the hip and that physically the left knee is ready for a total knee replacement and that it is just that “everything is dependent upon the go ahead from the pain management people on when that optimally can be accomplished”. Id.

INJURY

In this case, the parties have stipulated that a work-related injury occurred on May 5, 1996, while the Claimant was in the course and scope of her employment with Nexcom. Thus, the issue to be addressed is the nature and extent of the Claimant’s disability.

DISABILITY

In this case, the parties have stipulated that the Claimant has been totally disabled from July 3, 1996. (TR 15). Thus, there is no issue as to the nature of the disability. Therefore, the only issue to be addressed under disability, is the extent of the Claimant’s disability.

Although, the Employer’s counsel stipulated to temporary, total disability at the time of the hearing, this stipulation was omitted in the final brief submitted by the Employer on February

18, 2000. In the brief, Attorney Barrett cites a labor market survey that was entered into the record at the hearing. (EX 27). He states that these are potential jobs which are sedentary within Dr. Bergfeld's restrictions and recommendation. (EB 10). However, due to the stipulation of total disability made on the record at the hearing, this survey has no bearing on the decision of disability.

In a case where the parties have not stipulated to the extent of the disability (total or partial), the Claimant has the initial burden of proving a prima facie case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56-59 (1980). If the Claimant is able to prove his prima facie case, the burden then rests on the employer to demonstrate the existence of suitable alternative employment in the area. If the employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

The labor market survey along with Dr. Bergfeld's testimony and recommendation that Ms. Kovacic do sedentary jobs have no bearing on the issue of whether the Claimant is totally disabled, because the issue has already been stipulated to at the hearing.

NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement". An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI". *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Any disability before reaching MMI would be temporary in nature. *Id.*

The determination of when maximum medical improvement is reached, so that a Claimant's disability may be said to be "permanent", is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186

(1988).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that the maximum medical improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the Claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the Claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom.*, *Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Duhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir 1979), where Claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within Claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of Claimant's credible complaints of pain alone. *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Wahington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that Claimant's disability is temporary or permanent may not be based on a prognosis that Claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'd* 9 BRBS 138 (1978).

CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

The employer argues that the Claimant has not yet reached maximum medical improvement because she can benefit from a total knee replacement and her psychological status has begun improving in recent months.

The employer's argument is predicated on the testimony of Dr. Bergfeld, the Claimant's treating orthopedic physician. Dr. Bergfeld has testified that in his opinion Ms. Kovacic has not reached maximum medical improvement because she can benefit from a total knee replacement. (DP 18). However, Dr. Bergfeld admits that this surgery is not recommended until the Claimant is able to substantially improve her psychological state. (DP 42-45). Dr. Bergfeld further testified that a more appropriate time for the knee replacement surgery would be when the psychiatrist and psychologist felt that the Claimant was stable enough to handle the stress of a major operation. Id.

Dr. DeMarco, the Claimant's treating psychologist testified at the hearing that it was his opinion that the Claimant was permanently disabled by her condition. (TR 39-40). He further went on to state that he believed at times the Claimant appears to be losing ground emotionally and that their work together has really focused on her from deteriorating further. (TR 33).

Because Ms Kovacic's treating psychological doctor has deemed her to be totally disabled, I find that her condition is permanent. Dr. Bergfeld has said that the Claimant is unable to handle a knee replacement surgery and that he will defer to the opinion of her psychological doctors. Dr. DeMarco does not think the Claimant will ever return to a mental state that would make her potential knee surgery successful. Her mental state is so severe that even an improvement in medical condition would not lessen her mental disability.

It is therefore found that the Claimant has reached maximum medical improvement. The date of that occurrence is set out in Exhibit E 39, September 8, 1998.

ORDER

1. The Employer will pay the Claimant based on the agreed average weekly wage for temporary total disability from the date of injury until September 9, 1998 and for total permanent disability from that date and continuing.
2. The Employer will pay the Claimant interest on any unpaid compensation at T-bill rate applicable under 28 U.S.C. 1961.
3. The Employer will be given credit for all compensation and interest already paid.
4. The Employer shall furnish all reasonable, appropriate and necessary medical care for treatment of the Claimant's work related injuries.
5. The Employer shall pay a 10% penalty for all compensation unpaid until the controversion of the claim.
6. The matter of relief under Section 8(f) shall be briefed by interested parties with briefs due on **September 11, 2000**.

7. The Claimant's attorney shall file within 30 days of receipt of this Decision and Order a fully supported and documented fee petition. The Employer shall have 20 days thereafter to object or comment.

GERALD M. TIERNEY
Administrative Law Judge

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a Notice of Appeal with the District Director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a Petition for Review, in accordance with the provisions of Part 802 of 20 C.F.R..